

# UNDERSTANDING THE ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT ANTI BRIBERY CONVENTION FOR INDIA

*Varun Chablani\**

*Corruption is one of the worst evils to have plagued the country and the world today. In order to tackle this problem, a number of international conventions dealing with matters of anti-corruption have emerged. The one which receives special attention in this paper is the Organization for Economic Cooperation and Development Anti Bribery Convention. This Convention aims at ending corruption by multinationals towards foreign public officials. Even though India is not a signatory to this Convention, the terms of the Convention will apply to it if investments are made by signatory countries within the territory of India. Further, if India becomes a signatory, the Indian multinationals will also be subjected to it, and will have to ensure that they do not engage in corrupt activities when doing business abroad. This paper examines the various terms of the Convention by focusing on certain important Articles of the Convention. In this respect, the paper also brings out deficiencies in the current Indian laws which impede compliance with these terms. The paper also discusses the probable impacts on India's foreign relations if it chooses to sign this Convention. It concludes with the argument that India should sign this Convention after the passage of a few years.*

## I. INTRODUCTION

The world today is plagued by corruption, especially corruption by multinational enterprises to foreign public officials: one of the biggest and oldest evils of society. Corruption, like a contagious disease, can disrupt the efficient functioning of the law and order system in a society, thus, leading to denial of justice, poverty, inequality, unemployment, violence and general political unrest.

Bribes by corporations to secure foreign contracts are not new. The prevention of such corruption has been envisaged in the Foreign Corrupt Practices Act, 1997 ('FCPA'), enacted by the United States.<sup>1</sup> This Act is based

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\* Associate at Lakshmi Kumaran & Sridharan, Chennai. I would like to acknowledge the help and support of Mr. Alok Nayak, practicing advocate at the Supreme Court of India, New Delhi. The views mentioned herein are personal.

<sup>1</sup> Foreign Corrupt Practices Act, 1997 (U.S.) (amended as 15 U.S.C. §§ 78dd-1 to -2 (1994).

on the US ideology of preventing corruption by multinationals. The United States amended the FCPA to incorporate specific commitments, resulting in a few, but significant changes. As per these changes, the definition of foreign bribery at present includes the purpose of “securing any improper advantage” and officials of public international organizations are now under the ambit of the FCPA, as per (f)(1)(a) of Chapter 2B of title 15 of the United States Code. It is pertinent to note that while the Europeans were openly and handsomely paying bribes (and still face, comparatively lesser compliance pressures),<sup>2</sup> the US corporations were penalised with the FCPA, which values personal integrity more than financial strength.<sup>3</sup>

In order to enforce its FCPA practices, the United States used the Organization for Economic Cooperation and Development Anti-Bribery Convention (‘the OECD Convention’),<sup>4</sup> which includes all the OECD members as well as some other countries which voluntarily joined the Convention. Due to increasing trade between the signatory countries, the impact of the Convention has now reached new heights. This is evidenced by the fact that a major portion of investments routed towards India are from the signatory countries. Due to this, the corporations of the signatory countries are subjected to the terms of the OECD Convention despite India not being one of the 40 member countries to have signed the Convention,<sup>5</sup> even though there has been some pressure on India to join.<sup>6</sup> However, India has a comparatively weak enforcement mechanism which is a cause for deterring investment as the implementation of the OECD Convention is strictly monitored by the OECD.

## II. BACKGROUND TO THE OECD CONVENTION

The OECD is generally considered to be a ‘rich nations’ club.<sup>7</sup> However, it makes efforts to keep a healthy relationship with, and solicit par-

<sup>2</sup> *FCPA: Ethical Beacon or Anti-Competitive Burden*, January 2, 2012, available at [http://www.hodgsonruss.com/Home/Practice\\_Areas/Alphabetical\\_Listing/Business\\_Litigation/News/ReenaDuttaBrianDManningandMichelleMerolaCoAuthorFCPAEthical](http://www.hodgsonruss.com/Home/Practice_Areas/Alphabetical_Listing/Business_Litigation/News/ReenaDuttaBrianDManningandMichelleMerolaCoAuthorFCPAEthical)

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<sup>3</sup> Criminal Division of the U.S. Department of Justice, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, November 14, 2012, 3, available at <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf> (Last visited on June 23, 2013).

<sup>4</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed on 17 December 1997 and entered into force on 15 February 1999).

<sup>5</sup> OECD, *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status as of 20 November 2012*, available at <http://www.oecd.org/daf/anti-bribery/antibriberyconventionratification.pdf> (Last visited on June 23, 2013).

<sup>6</sup> *Clinton asks India, China to Join Anti-Bribery Convention*, HINDUSTAN TIMES March 23, 2012, available at <http://www.hindustantimes.com/world-news/NorthAmerica/Clinton-asks-India-China-to-join-anti-bribery-convention/Article1-829976.aspx> (Last visited on June 23, 2013).

<sup>7</sup> *A Club of Rich Nations Looks beyond Europe*, NEW YORK TIMES November 30, 1994, available at <http://www.nytimes.com/1994/11/30/business/a-club-of-rich-nations-looks-beyond-europe.html> (Last visited on June 23, 2013).

ticipation from, non member countries.<sup>8</sup> Besides, the Convention itself is open to accession by non member countries.<sup>9</sup> It is pertinent to note that though the OECD Convention defines bribery and calls for member countries to criminalize it, it does not address the common practice of permitting bribes to be deducted from income as a business expense while computing taxes.<sup>10</sup>

Under the Convention, signatories consent to habitual, in-depth monitoring of efforts made to battle corruption.<sup>11</sup> Countries that have signed the Convention are required to put in place legislations that criminalise the act of bribing a foreign public official. The OECD has no authority to implement the Convention, but instead monitors implementation. Countries are responsible for implementing laws and regulations that conform to the Convention and therefore, provide for enforcement.

The OECD performs its monitoring function in a two-phased examination process. Phase I consists of a review of the legislation implementing the Convention in the member country with the goal of evaluating the adequacy of the laws. Phase II assesses the effectiveness with which the legislation is applied.<sup>12</sup>

Although the Convention is modelled on the FCPA, there are pertinent distinctions. For example the Convention is unclear with respect to its applicability to the bribery of family members of foreign public officials. Through such ambiguities, signatory countries can take advantage of the limitations of the Convention.<sup>13</sup>

<sup>8</sup> OECD, *Global Relations*, available at <http://www.oecd.org/globalrelations/non-member-participationinformaloecebodies/> (Last visited on June 23, 2013).

<sup>9</sup> See OECD, *Bribery and Corruption: The OECD Convention on Combating Foreign Public Officials in International Business Transactions*, available at <http://www.oecd.org/corruption/oecdantibriberyconvention.htm> (Last visited on June 23, 2013) (Shows some Non-Members having signed and ratified the Convention).

<sup>10</sup> Walter Perkel, *Foreign Corrupt Practices Act*, 40 AM. CRIM. L. REV. 683, 704 (2003); OECD, Centre for Tax Policy and Administration, *OECD Bribery Awareness Handbook for Tax Examiners*, 7-8, ¶5.1, available at <http://www.revenue.ie/en/business/oecdbryby.pdf> (Last visited on June 23, 2013).

<sup>11</sup> *Id.*

<sup>12</sup> International Association of Anti-Corruption Authorities, *Economic Cooperation and Development (OECD)*, February 15, 2012, available at [http://www.iaaca.org/AntiCorruptionAuthorities/ByInternationalOrganizations/InterGovernmentalOrganization/201202/t20120215\\_805456.shtml](http://www.iaaca.org/AntiCorruptionAuthorities/ByInternationalOrganizations/InterGovernmentalOrganization/201202/t20120215_805456.shtml) (Last visited on June 23, 2013).

<sup>13</sup> See e.g., OECD, Directorate for Financial and Enterprise Affairs, *United Kingdom: Phase 2, The Follow-Up Report On The Implementation Of The Phase 2 Recommendations by the OECD*, June 21, 2007, available at <http://www.oecd.org/corruption/anti-bribery/anti-bribery-convention/38962457.pdf> (Last visited on August 17, 2013) (Explains the incongruity between the common law criminal liability of companies *vis-à-vis* the European Union Procurement Directive. It states in ¶ 7:

“Policies excluding convicted companies from access to public benefits such as export credit or development aid moneys can only be effective if companies can be convicted of bribery in the first place. Conviction of a company for foreign bribery was not a realistic possibility under applicable UK case law at the time of the Phase 2 Report and the

The impact of the OECD Convention is also reduced by the fact that it does not apply to several states that are apparently extensively implicated in the bribery of foreign public officials. In particular, the three countries- India, China and Russia, found at the bottom of the Bribe Payers Index ('BPI'),<sup>14</sup> are not parties to the OECD Convention. This highlights the fact that unless there is a concentrated international effort and political willingness to combat the issue, effective measures against the bribery of foreign public officials will stay intangible.<sup>15</sup>

In 2005, Transparency International commissioned a baseline study of corruption in India that is being updated for 2007.<sup>16</sup> The study was limited to the types of corruption experienced by the common man and not mega corruption issues. Although the amount of money involved in mega-corruption may be larger, the injury to society is greater in the smaller cases of corruption because it "corrodes the moral fibre of . . . society".<sup>17</sup> It has been observed that there is a very strong correlation between the large scale corporate corruption and petty everyday corruption faced by the common man, and that controlling the latter can go a long way in combating corruption at other levels.<sup>18</sup> Such a correlation becomes all the more important when discussing as to whether (and when) India should sign the Convention.

The survey found that the police were considered to be most corrupt of all public services and over 80% of all citizens who had dealings with the police paid bribes.<sup>19</sup> Government hospitals were also perceived as most corrupt within the basic services category.<sup>20</sup> The survey found major differences among twenty states, in terms of corruption, wherein Kerala was considered the least corrupt and Bihar, the most corrupt. Among the industrialised states, Gujarat, Andhra Pradesh and Maharashtra were rated comparatively less corrupt while Karnataka was on the wrong end of the table.<sup>21</sup> This report, having

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law remains unchanged. Accordingly, while the UK has taken action since the Phase 2 Report in implementing a European Union Procurement Directive regarding sanctions on convicted companies, the Working Group doubts that they will be useful with regard to UK companies that engage in bribery until the law on the liability of legal persons (companies) for foreign bribery is modified").

<sup>14</sup> Transparency International, *Visualizing the Bribe Payers Index 2011*, available at <http://bpi.transparency.org/bpi2011/interactive/> (Last visited on June 23, 2013) (The Bribe Payers Index compares the likelihood of firms from the world's industrialized countries to bribe abroad. The 2011 Bribe Payers Index Report shows India to be at 19, China at 27 and Russia at 28).

<sup>15</sup> John, Hatchard, *Recent Developments in Combating Bribery Against Foreign Public Officials: A Cause for Optimism*, 85 U. DET. MERCY L. REV. 1, 4 (2007).

<sup>16</sup> Transparency International India, *India Corruption Study 2005*, available at [http://archive.transparency.org/regional\\_pages/asia\\_pacific/newsroom/news\\_archive2/india\\_corruption\\_study\\_2005](http://archive.transparency.org/regional_pages/asia_pacific/newsroom/news_archive2/india_corruption_study_2005) (Last visited on July 31, 2011).

<sup>17</sup> *Id.*

<sup>18</sup> Alexandros Zervos, *Amending the Foreign Corrupt Practices Act: Repealing the Exemption for "Routine Government Action" Payments*, 25 PENN.SI.LR 251 (2006).

<sup>19</sup> Transparency International India, *supra* note 16, 8.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*, Ranking of States, Table 1.5, 10, ¶1.5.

taken the point of view of the service providers, cited reasons for such corruption including heavy work load, political interference, outdated infrastructure etc.<sup>22</sup> The report made many recommendations; however, they have not been seriously implemented.<sup>23</sup> This is despite the recent proactive role taken by the media with regard to issues of corruption where it brought to light enormous scams like the 2G, Adarsh Housing, Commonwealth scams etc.

Despite the wide spread corruption in India, its cooperation with the OECD since late 2009, has only become tenuous. India's role at the Working Group on Bribery ('WGB') meeting is merely that of an *ad hoc* observer, represented by the Central Bureau of Investigation ('CBI'), the Central Vigilance Commission ('CVC') and the Ministry of Personnel, Department of Personnel and Training.<sup>24</sup> However, the WGB has urged India to continue engaging with the Group and attend its meetings.<sup>25</sup>

With the OECD keen on India signing this Convention<sup>26</sup> (and India keen on having closer cooperation with the OECD),<sup>27</sup> this paper attempts to make a cost benefit analysis in order to assess whether India should consider signing the same. This includes a discussion on, *inter alia*, the scope of other international instruments treaties relating to anti-corruption, understanding certain core provisions of the OECD Convention and assessing the reaction of international organisations like World Bank, WTO if India signs the

<sup>22</sup> *Id.*, 13.

<sup>23</sup> *Id.*, 222 (The recommendations were as follows-

- (a) Exemplary action against sinners.
- (b) Electoral reforms to check the entry of corrupt politicians.
- (c) Implementation of Right to Information in government departments.
- (d) Privatization (with competition) in the provision of services, like electricity.
- (e) Security to honest officials.
- (f) Building a people's movement against corruption.
- (g) Time-bound and effective implementation of judicial pronouncements.
- (h) Provision of Ombudsman in every ministry/department to redress people's grievances.
- (i) Overhaul of judicial procedures.
- (j) Ending of class-specific favors and privileges
- (k) Insistence on redress of grievances by senior officers.
- (l) Giving more powers to anti-corruption departments
- (m) Intervention by civil society organizations in cases of victimization of officers).

<sup>24</sup> OECD, Working Group on Bribery in International Business Transactions, Directorate For Financial and Enterprise Affairs Investment Committee, *Anti-Corruption Global Relations Newsletter, Daff/Inv/Br (2010 )33*, Paris, December 14-17, 2010, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/INV/BR\(2010\)33&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/INV/BR(2010)33&docLanguage=En) (Last visited on July 30, 2011).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; See also OECD, Bribery and Corruption, *The Tenth Anniversary of the OECD Anti-Bribery Convention: Its Impact and its Achievements, Opening Remarks by Angel Gurría, OECD Secretary-General at the 10<sup>th</sup> Anniversary of the OECD Anti-Bribery Convention*, Rome, November 21, 2007, available at [http://www.oecd.org/document/37/0,3343,en\\_2649\\_34487\\_39656933\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/37/0,3343,en_2649_34487_39656933_1_1_1_1,00.html) (Last visited on July 30, 2011).

<sup>27</sup> OECD Working Group on Bribery, *Annual Report, 2010*, available at <http://www.oecd.org/dataoecd/7/15/47628703.pdf> (Last visited on July 30, 2011).

Convention. In conclusion, the paper recommends signing the Convention subject to certain conditions.

### III. INTERNATIONAL ANTI-CORRUPTION INSTRUMENTS AND THEIR RELATION WITH THE OECD CONVENTION

There are a number of international anti-corruption related instruments. Each will be discussed below –

#### A. *TRANSPARENCY INTERNATIONAL*

Transparency International ('TI') is a non-governmental organization committed to reducing corruption in politics, public contracting, private sector, international aid and economic development across the world.<sup>28</sup> It does so by conducting in depth studies and publishing its results in order to improve public awareness on these issues.<sup>29</sup>

Two of its efforts in this regard are particularly relevant to this discussion. *First*, TI's Corruption Perceptions Index ('CPI') (which measures the perceived levels of Public Sector Corruption) is an annual report that ranks more than 180 countries on their perceived levels of corruption.<sup>30</sup> This is determined by both, opinion surveys and expert assessments. *Second* is the BPI, which is derived from surveys that evaluate the likelihood of businesses from industrialized countries to bribe abroad.<sup>31</sup>

#### B. *UNITED NATIONS CONVENTION AGAINST CORRUPTION*

In 2003, shortly after the OECD effort, the United Nations adopted the U.N. Convention Against Corruption ('UNCAC'),<sup>32</sup> indicating an even broader consensus that corruption disrupts economic development and will hinder a country's progress. Over 150 countries have signed the UNCAC, which is seen as the only global legal anti-corruption instrument. It requires

<sup>28</sup> See Transparency International, *About Transparency International*, available at [http://www.transparency.org/about\\_us](http://www.transparency.org/about_us) (Last visited on 20 March, 2011).

<sup>29</sup> See Transparency International, *Surveys & Indices*, available at [http://www.transparency.org/policy\\_research/surveys\\_indices/](http://www.transparency.org/policy_research/surveys_indices/) (Last visited on July 20<sup>th</sup>, 2011) (Introducing various reports on TI's website).

<sup>30</sup> *Id.*

<sup>31</sup> See Transparency International, *Bribe Payer's Index*, available at [http://www.transparency.org/news\\_room/latest\\_news/press\\_releases/2008/bpi\\_2008\\_en](http://www.transparency.org/news_room/latest_news/press_releases/2008/bpi_2008_en) (Last visited on July 24, 2011).

<sup>32</sup> United Nations Convention Against Corruption, adopted on October 31, 2003, UN Res. A/RES/58/4.

signatories to declare that bribery, embezzlement of public funds, money-laundering, and obstruction to justice are criminal acts and proposes both a “global language about corruption and a coherent implementation strategy”.<sup>33</sup> India has ratified this Convention recently.<sup>34</sup>

Ratification of the UNCAC will make it easier for India to comply with the OECD Convention. This is because Mutual Legal Assistance is required to be fulfilled by the signatories of the UNCAC,<sup>35</sup> and is also a clause in the OECD Convention. Mutual Legal Assistance is envisaged under Article 9 of the OECD Convention, and includes removal of any professional secrecy privileges.<sup>36</sup> Since India does not have very rigid secrecy laws, this clause should be comparatively easy to implement. Additionally, international law is also seeing a strong trend towards lifting of professional secrecy.<sup>37</sup> Moreover, the reviewing mechanism, as prescribed under the UNCAC, involves a self assessment checklist.<sup>38</sup> Since India would have already assessed itself under the UNCAC, compliance under the OECD Convention (wherein the OECD itself monitors the signatories) is expected to become easier.

<sup>33</sup> United Nations Office on Drugs and Crime, *Promoting Health, Justice and Rule of Law*, available at [http://multimedia.unodc.org/documents/southasia/reports/UNODC\\_ROSA\\_BROCHURE\\_2011.PDF](http://multimedia.unodc.org/documents/southasia/reports/UNODC_ROSA_BROCHURE_2011.PDF) (Last visited on July 21, 2011).

<sup>34</sup> *India Ratifies U.N. Convention against Corruption*, THE HINDU May 12, 2011, available at <http://www.thehindu.com/news/national/article2012804.ece> (Last visited July 30, 2011); *India To Ratify Un Convention Against Corruption Soon*, THE ECONOMIC TIMES November 30, 2010, available at [http://articles.economicstimes.indiatimes.com/2010-11-30/news/27568125\\_1\\_transparency-international-corruption-87th-spot](http://articles.economicstimes.indiatimes.com/2010-11-30/news/27568125_1_transparency-international-corruption-87th-spot) (Last visited on May 12, 2011).

<sup>35</sup> UNCAC, *supra* note 32, Art. 46.

<sup>36</sup> OECD Convention, *supra* note 4, Art. 9 (Mutual Legal Assistance–

1. Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person. The requested Party shall inform the requesting Party, without delay, of any additional information or documents needed to support the request for assistance and, where requested, of the status and outcome of the request for assistance.
2. Where a Party makes mutual legal assistance conditional upon the existence of dual criminality, dual criminality shall be deemed to exist if the offence for which the assistance is sought is within the scope of this Convention.
3. A Party shall not decline to render mutual legal assistance for criminal matters within the scope of this Convention on the ground of bank secrecy).

<sup>37</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, Art.7(5); Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime Strasbourg, 1990, Art.18(7); Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to Medicinal Products for Human Use, Art. 7; Council of Europe Criminal Law Convention on Corruption, ETS 173, Strasbourg, 1999, Art.26(3); UN General Assembly, United Nations Convention Against Corruption, October 31, 2003, A/58/422, Art. 46(8).

<sup>38</sup> United Nations, *Report of the Conference of the States Parties to the United Nations Convention against Corruption on its Third Session*, COSP/2009/15 Resolution 3/1, Doha, November 9-13, 2009 CAC, available at <http://www.unodc.org/documents/treaties/UNCAC/COSP/session3/V0988538e.pdf> (Last visited on June 23, 2013).

Furthermore, Article 16 of the UNCAC essentially captures the spirit of the OECD Convention.<sup>39</sup> This Article requires State Parties to legislate domestic laws criminalising bribery to foreign public officials, both from the demand side and supply side. To give effect to this, The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011 was introduced in the Parliament.<sup>40</sup> The Bill seeks to prohibit illegal gratification given to (Draft § 4) / received by (Draft § 3) foreign public officials and public international organisations officials (including abetments thereof), declares these offences as extraditable (Draft § 7), provides for rendering assistance to contracting states, provides for reciprocal arrangements for processes/ transfer (Draft §§ 8, 9, 10, 11) and provides for attachment, seizure and confiscation of property in a contracting state or in India (Draft § 12).

### C. THE WORLD BANK

The World Bank has emerged as a strong force against corruption on the economic stage. After conducting a multi-stakeholder consultation, the World Bank published a strategy paper, “Strengthening World Bank Group Engagement on Governance and Anticorruption”, detailing its proposed course of action.<sup>41</sup> The extent of international participation is impressive. Over 3200 representatives from all stakeholder groups participated in and contributed to the report. The World Bank, besides raising awareness on transparency and governance issues in India,<sup>42</sup> also makes various recommendations

<sup>39</sup> OECD Convention, *supra* note 4, Art. 16 (Bribery of Foreign Public Officials and Officials of Public International Organizations):

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.
2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties).

<sup>40</sup> The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organizations Bill, 2011, Bill No. 26 of 2011, available at <http://www.prsindia.org/uploads/media/Bribery/Prevention%20of%20Bribery,%2026%20of%202011.pdf> (Last visited on August 17, 2013).

<sup>41</sup> The World Bank, *Guiding Principles for Strengthening World Bank Group Engagement on Governance and Anticorruption*, available at <http://go.worldbank.org/qnkkdxeln0> (Last visited on July 31, 2011).

<sup>42</sup> *Regional Workshop Towards More Open and Transparent Governance in South Asia Organised by the Indian Institute of Public Administration in collaboration with The World Bank*, April 27-29, 2010, available at <http://rtiworkshop.pbworks.com/w/page/24411862/Home> (Last visited on July 31, 2011).



on strategy and implementation plans on combating corruption and improving governance.<sup>43</sup>

#### D. ASIAN DEVELOPMENT BANK

The initial international movement by OECD countries clearly had a ripple effect around the world. In 1998, the Asian Development Bank ('ADB') introduced the Anti-Corruption Policy.<sup>44</sup> Subsequently, in 2004, the ADB introduced its so-called Policy Clarifications,<sup>45</sup> followed two years later by the Harmonized Definitions of Corrupt and Fraudulent Practices,<sup>46</sup> an Operations Manual, and Integrity Principles and Guidelines.<sup>47</sup> These were the result of increased international discussions. Most recently, in March 2013, the ADB passed the Guidelines on Use of Consultants by ADB and its Borrowers and Procurement Guidelines. In 2006, it issued the "Anti-Corruption Policies in Asia and the Pacific: Progress in Legal and Institutional Reform in 25 Countries".<sup>48</sup> The report mentions that, "As very few of the countries in this report have penalized bribery of foreign public officials, bribes paid on foreign markets can be legally deducted from taxable income".<sup>49</sup> This shows that there is a long way ahead for most of the countries covered under the report (including India) to achieve the spirit of the OECD Convention.

The Business and Industry Advisory Committee ('BIAC') notes that since China, India and Russia are not parties to the OECD Convention, this can significantly undermine the OECD's effort to create a level playing field for international business.<sup>50</sup> It also urges the OECD to use its enhanced engagement process with these countries in order to bring them closer to the OECD policy standards, and ultimately to work them towards adherence to the OECD

<sup>43</sup> World Bank, *Tackling Corruption, The World Bank Group's Updated Strategy And Implementation Plan*, March 6, 2012, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/03/14/000386194\\_20120314010633/Rendered/PDF/674410BR0SecM20Official0Use0Only090.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/03/14/000386194_20120314010633/Rendered/PDF/674410BR0SecM20Official0Use0Only090.pdf) (Last visited on July 31, 2011).

<sup>44</sup> Asian Development Bank (ADB), *Anticorruption Policy and Strategies (1998)*, available at <http://www.adb.org/Documents/Policies/Anticorruption/anticorruption.pdf> (Last visited on July 23, 2011).

<sup>45</sup> *Id.*

<sup>46</sup> ADB, *Anticorruption Policy: Harmonized Definitions of Corrupt and Fraudulent Practices (2006)*, available at <http://www.adb.org/Documents/Policies/Anticorruption/definitions-update.pdf> (Last visited on July 23, 2011).

<sup>47</sup> ADB, *Integrity Principles and Guidelines (2006)*, available at <http://www.adb.org/Documents/Guidelines/Integrity-Principles-Guidelines/integrity-guidelines-procedures-2006.pdf> (Last visited on July 23, 2011).

<sup>48</sup> ADB, *Anti-Corruption Policies with Asia and the Pacific: Progress in Legal and Institutional Reform in 25 Countries (2006)*, available at <http://www.adb.org/Documents/Reports/Anticorruption-Policies/anticorruption-policies.pdf> (Last visited on July 23, 2011).

<sup>49</sup> *Id.*, 28.

<sup>50</sup> OECD, *Responses to the Consultation Paper on the Review of the OECD Anti-Bribery Instruments Comments From BIAC (Business And Industry Advisory Committee To The OECD)*, available at [www.oecd.org/dataoecd/7/24/40498754.pdf](http://www.oecd.org/dataoecd/7/24/40498754.pdf) p.2 (Last visited on July 23, 2011).

Convention. It also highlights the fact that even though these countries have signed the UNCAC, this alone cannot provide sufficient remedy.<sup>51</sup>

#### IV. REQUIREMENTS FOR INDIA

No longer just an outsourcing outpost, India has also become a promising market. While economic reforms in India began in 1991, GDP growth since then has not been linear. Good GDP growth is expected further, though at a lesser rate hereinafter. According to the World Bank in the Global Economic Prospects Report, a growth of 6.7% has been projected in Financial Year '2015'.<sup>52</sup> This, coupled with the fact that India's population is the youngest in the world and that India will outpace China in 2035 as the world's most populated country, positions India in my opinion, as the "market not to miss" in the Twenty First century. These statistics underscore the potential desirability of India as the next "China Syndrome".

Yet, enormous challenges to doing business in India exist and the same will have to be addressed. Reforms are needed to make the legal environment more predictable and hospitable for long term business growth. Therefore, what is needed in India is the fine tuning of domestic legislations to criminalize bribery of foreign public officials, as the OECD Convention would require. India has already ratified the UNCAC, making things easier. Further, India needs to strengthen its national commitment to create a transparent business climate that abhors the payment of bribes domestically and internationally. Also, protection for whistleblowers must be included as it is an essential aspect of any anti-corruption campaign.<sup>53</sup> Therefore, foreign companies investing in India would need to appreciate the legal risk they face if they engage in bribery within India's borders.

I shall now discuss Articles 4, 5 and 9 of the OECD Convention in context of India, which are, without prejudice to any other article, important in answering the question posed in this paper.

In order to adhere to the OECD Convention and to ensure transparency, the primary requirement for India is to adopt the nationality principles, as enshrined under Article 4 of the Convention.<sup>54</sup> Jurisdiction is of crucial

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<sup>51</sup> *Id.*

<sup>52</sup> The World Bank, *Global Economic Prospects*, available at [http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1322593305595/8287139-1371060762480/GEP2013b\\_full\\_report.pdf](http://siteresources.worldbank.org/INTPROSPECTS/Resources/334934-1322593305595/8287139-1371060762480/GEP2013b_full_report.pdf) (Last visited on August 18, 2013).

<sup>53</sup> OECD Working Group on Bribery, *supra* note 27, 85.

<sup>54</sup> OECD Convention, *supra* note 4, Art. 4 (Jurisdiction):

1. Each Party shall take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory.

importance in anti-bribery investigations,<sup>55</sup> and Articles 4(1) and 4(2) establish the two major principles of the OECD Convention in relation to jurisdiction: territoriality and nationality.

The Principle of Ubiquity, which has gained acceptance in almost all legal systems,<sup>56</sup> lays down that territorial jurisdiction is established where the act (which includes promise, offer or giving) occurs.<sup>57</sup> Bribery is a 'conduct crime' or '*Tätigkeitsdelikt*',<sup>58</sup> instead of a 'result crime' or '*Erfolgssdelikt*': hence, all elements relate to the act or omission itself. In this regard, the first principle of territoriality as provided for under Article 4, talks about the extra-territorial applicability of the Convention on multinationals.<sup>59</sup> It makes Indian corporations liable for acts of corruption done to foreign public officials outside the jurisdiction of India, even if the recipient country does not have any such prohibiting laws.

With regard to the second principle of nationality, this Article deals with 'active nationality' or 'active personality principle',<sup>60</sup> which states that nationals are liable to prosecution in their home state for offences they commit abroad.<sup>61</sup> Furthermore, the nationality principle is extended to corporations, as evidenced by the reports of the Working Group on Bribery.<sup>62</sup> In addition, it is well established that the OECD Convention is concerned with 'active corruption', i.e., corruption on the supply side.<sup>63</sup>

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2. Each Party which has jurisdiction to prosecute its nationals for offences committed abroad shall take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official, according to the same principles.
  3. When more than one Party has jurisdiction over an alleged offence described in this Convention, the Parties involved shall, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution.
  4. Each Party shall review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials and, if it is not, shall take remedial steps).

<sup>55</sup> OECD, *Australia-Review of Implementation of the Convention and the 1997 Recommendation*, available at <http://www.oecd.org/dataoecd/0/29/2378916.pdf> (Last visited on 24<sup>th</sup> November, 2010).

<sup>56</sup> Conseil de l'Europe 1990, 8 et seq.; Cassani 1996, 246 et seq.; Gilbert, G., *Crimes Sans Frontières: Jurisdictional Problems in English Law* in INTERNATIONAL CRIMINAL LAW AND PROCEDURE 122 (Dugard, J & Wyngaert, Ch Van den eds., 1996).

<sup>57</sup> *Id.*, ¶277.

<sup>58</sup> *Id.*, 116.

<sup>59</sup> OECD Convention, *supra* note 4, Art. 4.

<sup>60</sup> HILLIER, T., SOURCEBOOK ON PUBLIC INTERNATIONAL LAW 248 (1998).

<sup>61</sup> Blakesley, L., *Extra-Territorial Jurisdiction* in BASSIUNI, C.M. INTERNATIONAL CRIMINAL LAW 40 (1999); L'AVE, W.R., CRIMINAL LAW 141 (2000).

<sup>62</sup> OECD, *Australia-Review of Implementation of the Convention and the 1997 Recommendation*, available at <http://www.oecd.org/dataoecd/0/29/2378916.pdf> (Last Visited on 24th November, 2010); See also OECD, *Country Reports on the Implementation of the OECD Anti-Bribery Convention*, available at <http://www.oecd.org/investment/countryreportsonthetheimplementationoftheoecdanti-briberyconvention.htm> (Last visited on 24 November, 2010) (See United States, Hungary, Netherlands, Korea, Mexico, Norway and Poland).

<sup>63</sup> CORRUPTION AND MISUSE OF PUBLIC OFFICE 397 (Nicholls, Collin et al ed., 2006).

It is pertinent to note that while the nationality principle under Article 4(2) needs to be determined according to the general principles of domestic law of each country,<sup>64</sup> the territoriality principle is standardized, hence leading to its prevalence,<sup>65</sup> when the domestic law for the nationality principle is unclear.<sup>66</sup>

This Article is the core of the Convention, as the Convention envisages that the signatories adopt such anti corruption laws wherein both the territoriality and the nationality principles are enshrined. The Indian legislations, while defining public servants, are much narrower in scope and do not include foreign public officials.<sup>67</sup> This is not to say that wherever there is a mention of a public servant, it should include the term foreign public official (as some laws are meant only for domestic public officials); nevertheless it is important to criminalise acts of bribery on foreign public officials in order to gain the confidence of foreign businesses. Further, India will have to change its laws relating to extradition, as envisaged under Article 10 of the Convention because the Convention, *inter alia*, does away with the need of an extradition treaty, which would otherwise be required by the State to extradite a violator of the Convention.<sup>68</sup> Currently, India does not have any substantive law which criminalises corruption to foreign public officials (though it is a work in progress).<sup>69</sup> Mutual Legal Assistance is governed under §§ 166A and 166B of the Code of

<sup>64</sup> THE OECD CONVENTION ON BRIBERY: A COMMENTARY 273 (Mark Pieth et al ed., 2007).

<sup>65</sup> Brown, Lowell H., *The Extraterritorial Reach of the U.S. Government's Campaign Against International Bribery*, 22 HICLR 407 (1999).

<sup>66</sup> Crutchfield, Barbara, & Jutta Birmele, *The 1998 OECD Convention: An Impetus for Worldwide Changes in Attitudes toward Corruption in Business Transaction*, 37 ABLJ 485 (2000); The Lotus Case (France v. Turkey), 1927 P.C.I.J. (Ser. A) No.10, 19; OECD COMMENTARY, *supra* note 64, 273.

<sup>67</sup> See The Indian Penal Code, 1860, § 21; The Prevention of Corruption Act, 1988, §2(c).

<sup>68</sup> See OECD Convention, *supra* note 4, Art. 10 (Extradition—

1. Bribery of a foreign public official shall be deemed to be included as an extraditable offence under the laws of the Parties and the extradition treaties between them.
2. If a Party which makes extradition conditional on the existence of an extradition treaty receives a request for extradition from another Party with which it has no extradition treaty, it may consider this Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official.
3. Each Party shall take any measures necessary to assure either that it can extradite its nationals or that it can prosecute its nationals for the offence of bribery of a foreign public official. A Party which declines a request to extradite a person for bribery of a foreign public official solely on the ground that the person is its national shall submit the case to its competent authorities for the purpose of prosecution.
4. Extradition for bribery of a foreign public official is subject to the conditions set out in the domestic law and applicable treaties and arrangements of each Party. Where a Party makes extradition conditional upon the existence of dual criminality, that condition shall be deemed to be fulfilled if the offence for which extradition is sought is within the scope of Article 1 of this Convention).

<sup>69</sup> The Prevention of Bribery of Foreign Public Officials and Officials of Public International Organisations Bill, 2011 (Bill No 26 of 2011), available at <http://www.prsindia.org/uploads/media/Bribery%20of%20Bribery,%2026%20of%202011.pdf> (Last visited on June 23, 2013).

Criminal Procedure 1973, even without a treaty. However, such Mutual Legal Assistance is only limited to letters rogatory requests for witness testimony and production of evidence. Broadening the scope of the Mutual Legal Assistance provisions, among other things, is definitely a pre-requisite for signing the OECD Convention.

In my opinion, Article 5 which deals with ‘Enforcement’ is another important provision.<sup>70</sup> This provision intends to give primacy to the Convention, for example, economic interest, potential effect upon relations with another state or the identity of the natural or legal persons. Moreover, Article 5 also gives states ‘prosecutorial discretion’ for investigation and prosecution of violations of the Convention, i.e. the states have discretion as to whether to prosecute / investigate an offense. As evidenced by the fact that the Article has been interpreted to require that such discretion “be exercised on the basis of professional motives and not be subject to improper influence by concerns of a political nature”,<sup>71</sup> it can be said that the intention behind this principle is to avoid *abuse* of prosecutorial discretion. Yet, the principle of prosecutorial discretion is engaged in a “widespread and fundamental” manner in Article 5 of the Convention and limitations to this discretion have been minimal.<sup>72,73</sup>

Additionally, a large number of the state parties employ the discretionary system of prosecution.<sup>74</sup> On a wider spectrum, prosecutorial discretion has seen extensive use<sup>75</sup> and has earned its place in the laws governing prosecution,<sup>76</sup> bringing the practice of referring to internal guidance widespread recognition.<sup>77</sup> The OECD Commentary considers discretionary prosecution to be more advantageous than mandatory prosecution, “particularly where the efficient use of the resources is concerned”.<sup>78</sup> Moreover, providing the clause for prosecutorial discretion also gives comfort to state parties that their domestic law will be followed, thereby providing supremacy to the sovereignty of state parties. Essentially, the Commentary describes that Article 5 “cannot be regarded as a means of harmonising systems of criminal procedure. What it seeks is convergence and co-ordination in the fight against active bribery of foreign

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<sup>70</sup> See OECD Convention, *supra* note 4, Art. 5 (Enforcement Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons).

<sup>71</sup> OECD COMMENTARY, *supra* note 64, 292.

<sup>72</sup> Crutchfield, Barbara & Jutta Birmele, *supra* note 66; The Lotus Case (France v. Turkey), 1927 P.C.I.J. (Ser. A) No.10, 19; OECD COMMENTARY, *supra* note 64, 273.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*, 295.

<sup>75</sup> Beale, Sara Sun, *Rethinking the Identity and Role of United States Attorneys*, 6 OSJCL 369, 392 (2009).

<sup>76</sup> Burke, Alafair S., *Talking About Prosecutors*, 31 CLR. 2119-24 (2010).

<sup>77</sup> Abrams, Norman, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 ULR. 1, 57 (1971).

<sup>78</sup> OECD COMMENTARY, *supra* note 64, 293.

officials”.<sup>79</sup> Thus, if India were to sign this Convention, it would not require changing the criminal procedural laws. Rather, to the extent of Article 5, only the spirit of the Convention will be required to be followed.

Prosecutorial discretion grants importance to the influence of national systems in an investigation.<sup>80</sup> Article 5<sup>81</sup> and Article 3<sup>82</sup> express confidence and trust in national systems.<sup>83</sup> Reports from the Working Group on Bribery also establish that parties need not choose between national regimes of prosecutorial discretion and the enforcement guidelines under the Convention with even bank secrecy occasionally being preserved from the national system.<sup>84</sup> Further, the Council of Europe Recommendation of 2000, which provides important benchmarks for the prosecution of crime,<sup>85</sup> emphasizes on the principle that, “States should take appropriate measures to ensure that public prosecutors are able to perform their professional duties without unjustified interference or unjustified exposure to civil, penal or other liability,” failing which their effectiveness would be compromised upon.<sup>86</sup> This principle is reiterated in Guidelines of the International Association of Prosecutors,<sup>87</sup> and UN Guidelines on the Role of Prosecutors of 1990.<sup>88</sup>

Article 9, as already stated in Part II (B) of this paper, would anyway be complied with, due to ratification of the UNCAC. OECD has encouraged member states to reform national legislation to oust impeding legislations such as bank secrecy,<sup>89</sup> as otherwise, Mutual Legal Assistance would be com-

<sup>79</sup> OECD COMMENTARY, *supra* note 64, 296.

<sup>80</sup> OECD COMMENTARY, *supra* note 64, 295.

<sup>81</sup> OECD Convention, *supra* note 4, Art. 5.

<sup>82</sup> OECD Convention, *supra* note 4, Art. 3.

<sup>83</sup> OECD COMMENTARY, *supra* note 64, 295.

<sup>84</sup> Rubin, Nora M., *A Convergence of 1996 and 1997 Global Efforts to Curb Corruption and Bribery in International Business Transactions: The Legal Implications of the OECD Recommendations and Convention for the United States, Germany and Switzerland*, 14 AUILR; Compilation of Recommendations made in Phase 2 Reports, available at <http://www.oecd.org/dataoecd/51/45/37171905.pdf> (Last visited on November 25, 2010).

<sup>85</sup> OECD COMMENTARY, *supra* note 64, 298.

<sup>86</sup> Council of Europe Recommendation (2000), Principle 11; *Decision of the Council on the OECD Guidelines for Multinational Enterprises*, OECD Council 982<sup>nd</sup> session, C/M(2000) 17/PROV, June 26-27, 2000, available at [http://www.unite.it/UniTE/Engine/RAServeFile.php/f/sgpub/DOC\\_4\\_Follow-up\\_guidelines\\_OCSE.pdf](http://www.unite.it/UniTE/Engine/RAServeFile.php/f/sgpub/DOC_4_Follow-up_guidelines_OCSE.pdf) (Last visited on June 23, 2013); Burke, Alafair S., *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 WMLR. 1587, 1632 (2010).

<sup>87</sup> *Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors*, adopted by the International Association of Prosecutors, April 23, 1999, available at [http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999\\_EN.pdf](http://www.coe.int/t/dghl/monitoring/greco/evaluations/round4/IAP1999_EN.pdf) (Last visited on June 23, 2013).

<sup>88</sup> Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, August-September 27, 1990, U.N. Doc. A/CONF.144/28/Rev.1, 189 (1990).

<sup>89</sup> OECD, Working Group on Bribery in International Business Transactions, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, ¶XIII iv, November 29, 2009, available at <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44176910.pdf> (Last visited on November 25, 2010).

promised if states use the defence of domestic bank secrecy laws and avoid compliance under the Convention. This Article states that signatories must, to the fullest extent possible under their laws, relevant treaties, and arrangements, provide prompt and effective legal assistance to requesting states in criminal investigations and proceedings, concerning offenses within the scope of the OECD Convention. For non-criminal proceedings within the scope of the OECD Convention, legal assistance must be given where the allegation is brought by a signatory against a legal person. The requested state must inform the requesting state, without delay, of any additional information or documents required to support the request for assistance and, where requested, of the status and outcome of the request for assistance.<sup>90</sup>

Having discussed the core provisions of the OECD Convention and having examined their impact on the existing legal framework of India, the paper will now seek to analyse the possible impact on India's foreign relations if it signs this Convention.

## V. POSSIBLE IMPACT OF THE CONVENTION ON INDIA

Though it is very difficult to judge as to what the impact of the Convention will be, this chapter shall bring out some parameters in order to determine the same. This chapter discusses the possible impact on Foreign Direct Investment in India, India's bargaining power at the World Trade Organisation ('WTO') and India's relation with the World Bank, if India signs this Convention. These are predicted to be the three major areas that will be impacted if India accepts this Convention. India Inc.'s discussions with the OECD in adopting sound legal controls and compliance measures,<sup>91</sup> coupled with the Government ratifying the UNCAC, may imply that things may be moving forward.

*Firstly*, one needs to consider the Convention's impact on India's bargaining power at the WTO. Common perceptions exist that the WTO is partisan, taking care only of the interests of the rich nations.<sup>92</sup> But I here would like to state that the WTO, unlike other major inter-governmental organizations, is relatively free of politicization. This is because, as cited by one author, the WTO policies are not 'core foreign policies' as compared to the UN, thereby

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<sup>90</sup> Bruce Zagaris, Shaila Lakhani Ohri, *Law and Policy in International Business, The Role of Legal Institutions in the Economic Development of the Americas The Emergence Of An International Enforcement Regime On Transnational Corruption In The Americas*, 30 *LAW & POL'Y INT'L BUS.* 53 (1999).

<sup>91</sup> OECD, *India – OECD Seminar in Fighting Bribery*, May 23, 2013, available at <http://www.oecd.org/daf/anti-bribery/india-oecd-seminar-on-fighting-bribery.htm> (Last visited on June 23, 2013).

<sup>92</sup> Raghavan, Chakravarti, *Rulings Against India, Brazil Raise WTO Bias Disputes*, available at <http://www.twinside.org.sg/title/bias-cn.htm> (Last visited on September 10, 2013).

leading to lesser politicization.<sup>93</sup> Also, due to its technocrats' domain and narrow mandate (as compared to other Inter-Governmental Organizations), it is comparatively less politicized.<sup>94</sup>

One may argue that signing the OECD Convention would underpin India's inclusion into the developed world, thereby losing on the developing country stand that India has kept for so long in the WTO and the benefits therein. However, I submit that this is not entirely correct. *Firstly*, merely signing the Convention would not imply that India is subject to all the rules and regulations of the OECD. In order to be subject to all its rules and regulations, India should first be a member (analysis of which is slightly outside the scope of this article). In other words, as long as a country does not join an organisation, it can only be subject to those laws that it specifically signs and ratifies. Considering the fact that OECD is (mostly) an organisation for developed countries, not joining it would help India maintain those positions adopted at the WTO that other developing countries have also adopted. *Secondly*, it would make India an even more attractive investment destination, thereby increasing trade; which is the objective of the WTO. *Thirdly*, and most significantly, more investments made in the country would mean a higher vested interest by investor countries (usually the rich countries) thereby allowing Indian representatives to have better bargaining power in the WTO negotiations. Hence, I submit that there will be no adverse impact on India's bargaining power at the WTO. If at all, there will only be a positive impact.

Another point that comes to our consideration is the impact of World Bank policies and agreements if India signs the Convention. As mentioned, there is a possibility that by signing the Convention, India will be closer to the OECD, which would make the World Bank less generous towards India. For example, when Chile joined the OECD, being the only developing country to do so,<sup>95</sup> the aid given to Chile by the World Bank had reduced.<sup>96</sup> Hence, there exists a contradiction here. As seen earlier, the World Bank itself had been taking a strong stand against corruption,<sup>97</sup> but on the other hand, once Chile adopted the Convention, its' aid was reduced. This may very well be a concern and the government will have to make a consideration on this point before signing the Convention. With the kind of inequality and poverty that still exists in India, it can't afford to lose out on international financing.

However, a positive correlation has been found between the framing of favourable policies and efficient use of aid provided (i.e. good policies

<sup>93</sup> Arie Reich, *The Threat Of Politicization of the WTO*, 26 U. PA. J. INT'L ECON. L. 779 (2005).

<sup>94</sup> *Id.*

<sup>95</sup> OECD, *Chile Signs up as First OECD Member in South America*, January 11, 2010, available at [http://www.oecd.org/document/1/0,3746,en\\_21571361\\_44315115\\_44365210\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/document/1/0,3746,en_21571361_44315115_44365210_1_1_1_1,00.html) (Last visited on 28 July, 2011).

<sup>96</sup> Paul Collier & David Dollar, *Aid Allocation and Poverty Reduction* 11 (World Bank Policy Research Working Paper No. 2041, 1999).

<sup>97</sup> See *supra* Part III of this paper.



ensure that the aid has a positive impact).<sup>98</sup> Having considered that a strong stand against corruption is one of the policies that the World Bank adopts, implementing such anti-corruption policies, at least in the long term, should increase aid.

## VI. ALTERNATIVE MEANS TO REDUCE CORRUPTION BEFORE SIGNING THE OECD CONVENTION

What is required for India is not an external enforcement mechanism, but an internalized mechanism which will ensure that the act of corruption itself will become redundant. The reason is that whenever there is a top-down enforcement of a particular legislation, there exists a gap between the principal and the agent (the principal being the government as a macroeconomic entity and the agent being the public official who is bribed). There is an incentive for the principal to end corruption, as evidenced by the Government's ratification of the UNCAC. Yet, weak legal enforcement mechanisms, inferior political integrity, widespread income inequality, would attract the agent to consider otherwise, leading him to accept the bribe. So what is required is incentivizing the agent to act to the contrary.<sup>99</sup>

Towards this end, a point worth discussing is the fact that an increase in wages for public officials will reduce corruption. While this sounds intuitive, research conducted through a World Bank Working Paper on the State of Mauritania has proven this to be true.<sup>100</sup> Mauritania, like India faces an investment disincentive because of high levels of corruption. It was suggested that increasing the salary of public officials would reduce corruption.<sup>101</sup> The paper states:

“The higher the percentage of senior management time spent dealing with government regulations each week (i.e., tax time), the lower the probability of a firm to pay bribes in Mauritania. A 10 percent increase in the tax time would be associated with a 3 percent decrease in this probability, everything else held constant. This result suggests that companies that comply with procedures are less vulnerable to bribe predation.”<sup>102</sup>

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<sup>98</sup> Collier & Dollar, *supra* note 96, 11.

<sup>99</sup> DUBNER, STEPHEN J. & STEVEN D., LEVITT SUPER FREAKONOMICS: TALES OF ALTRUISM, TERRORISM, AND POORLY PAID PROSTITUTES Chapter 3 (2009).

<sup>100</sup> Manuela Francisco, Nicola Pontara, *Does Corruption Impact on Firms' Ability to Conduct Business in Mauritania? Evidence from Investment Climate Survey* (Data Policy Research Working Paper No. 4439, 2008).

<sup>101</sup> *Id.*, 14.

<sup>102</sup> *Id.*

As cited earlier in this paper, there is also a very strong correlation between day to day corruption and large scale corporate corruption wherein a reduction in the former would definitely help in controlling the latter.<sup>103</sup> While it is advisable on a diplomacy perspective for India to become a signatory to the OECD Convention, signing the Convention without having effective internal control measures is not a good solution. This is because the Country Reports issued by the OECD will subsequently expose non-compliance by the signatory (which can, therefore, become counter-effective in the game of diplomacy and adversely affect India's business climate).

## VII. CONCLUSION

As previously stated, it is extremely difficult to predict as to what the impact of ratifying the OECD Convention can be on India. One can only make estimations using traditional socio-economic instruments as done in this paper. However, what is important is that almost all groups want India to be a signatory. If India has to play a leading role in global trade in the future, it cannot languish in its corrupt bureaucratic past.

I believe that India certainly needs to sign the Convention, but not immediately. India, through internal mechanisms itself may be able to tackle the problem of corruption. This can be said (as discussed in Part I of this paper) because of the growing awareness about corruption and the strong anti-corruption movements that have gathered pace in India since 2011. These factors could ensure that principles of anti-corruption, transparency and accountability trickle down to business and government relations. As previously addressed in this paper, merely signing the Convention without having done any internal spadework on removing corruption will be counterproductive, as the OECD would provide an adverse report on India's implementation and enforcement of the Convention. Further, the impact of the UNCAC needs to be assessed before deciding whether the OECD Convention is required or not, as some of the concerns it addresses are similar to the OECD Convention. Nevertheless, India's relationship with the OECD is going to be very crucial in the coming years, with respect to the Convention as well as other instruments and policies.

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<sup>103</sup> See *supra* Part II.